



**The Comptroller General
of the United States**

Washington, D.C. 20548

Heitzman

Decision

Matter of: Damon R. Short - Underdeduction of FICA -
Waiver

File: B-230903

Date: October 7, 1988

DIGEST

The Department of the Navy is advised that it is not precluded from considering Federal Insurance Contributions Act (FICA) salary underdeductions which aggregate less than \$500 in amount for waiver under the provisions of 5 U.S.C. § 5584 (1982). The corresponding overpayment of wages is subject to waiver.

DECISION

The issue we are asked to decide is whether the Department of the Navy is precluded from considering Federal Insurance Contributions Act (FICA) salary underdeductions for waiver under the provisions of 5 U.S.C. § 5584 (1982), since FICA payments are in the nature of taxes. We hold that the corresponding overpayment of wages resulting from such underdeductions is subject of waiver.

BACKGROUND

Mr. Damon R. Short, a former employee of the Department of the Navy, has requested that we consider his claim for waiver under the provisions of 5 U.S.C. § 5584 (1982). Mr. Short was converted from a temporary position to a career conditional position with the Navy on February 19, 1984. At that time, he was erroneously placed under the Civil Service Retirement System (CSRS) instead of the new government retirement system provided for employees who

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are employed on or after January 1, 1984.^{1/} As a result, 7 percent of Mr. Short's salary was erroneously withheld and paid into the CSRS as administered by the Office of Personnel Management instead of into the Treasury under the FICA. The Navy later determined that Mr. Short was indebted to the United States for \$200.90 for underdeduction of FICA.^{2/}

The waiver statute, 5 U.S.C. § 5584, provides that the head of the agency may waive claims under certain conditions when the aggregate amount does not exceed \$500. The Navy declined to do so in Mr. Short's case since the debt resulted from underdeduction of FICA and since the Navy believed that they were precluded from reviewing the collection of taxes.

Our Claims Group advised the Navy of several pertinent decisions of our Office, Sidelle Wertheimer, B-202983, Mar. 10, 1982, and Patricia J. Engevik, B-202201, Dec. 23, 1981, but the Navy questioned whether these decisions are applicable here since they involved the opposite situation, i.e., underdeduction of CSRS instead of FICA. Thus, the Navy is still concerned about its waiver authority when the indebtedness concerns FICA.

OPINION

We do not rule on tax questions since those issues are for resolution by the individual concerned and the Internal Revenue Service. However, the issue here is not purely taxation. It also involves the administration of the waiver statute and the authority to waive erroneous payments under 5 U.S.C. § 5584. Victor Crichton, B-223588, July 17, 1987; 66 Comp. Gen. ____; Engevik, supra.

^{1/} See the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, 5 U.S.C. § 8331 note (Supp. III 1985), which required that a certain percentage of the employee's salary be deducted for social security taxes under FICA, pending establishment of a new government retirement system.

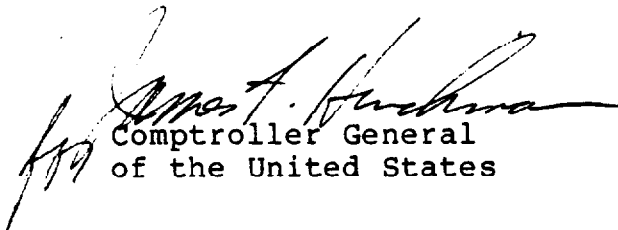
^{2/} The Navy has recovered the amount paid into CSRS and is prepared to pay the FICA taxes which are due. Normally the amount deducted would cover the FICA taxes and there would be no overpayment; however, Mr. Short worked overtime for which CSRS is not deducted.

Under the waiver statute, the head of the agency or the Secretary concerned may waive in whole or in part a claim of the United States in an amount aggregating not more than \$500 against any person arising out of an erroneous payment of pay or allowances. 5 U.S.C. § 5584(a)(2) (1982); 4 C.F.R. § 91.4(b) (1988). Thus, as long as the employee receives an erroneous overpayment of wages, the amount of the corresponding debt would be subject to waiver.

The Navy does not have the authority to waive payment of the FICA tax since employers are required to deduct the amount of the taxes as and when paid and are liable for the payment of the tax. 26 U.S.C. § 3102(a) and (b) (1982). Thus, the Navy is liable for payment of the full FICA tax for Mr. Short out of its appropriations, including the underdeducted amount of \$200.90.

Mr. Short received an erroneous overpayment of wages in the amount of \$200.90 due to the Navy's failure to deduct the correct FICA amount. The Navy's claim against Mr. Short for this amount is subject to waiver under 5 U.S.C. § 5584.

Accordingly, we agree with our Claims Groups' determination that the Navy has the authority to waive erroneous overpayments caused by the underdeduction of FICA contributions. Further, since there is no indication of fault or lack of good faith on the part of Mr. Short, we recommend that such waiver be granted.


James A. Buchanan
Comptroller General
of the United States